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No. 91-1387

In The

Supreme Court of the United States

October Term, 1991

THE CITY OF CATHEDRAL CITY; JACK R. SMITH,

Petitioners,

vs.

PAUL R. HOESTEREY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision regarding the time when a cause of action accrues for denial of procedural due process in violation of 42 U.S.C. § 1983 where the decision was reached primarily on the particular factual circumstances of the case and no conflict among the circuits exists?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petition contains perceived misstatements of fact and law. Therefore, respondent sets forth the following statement of the case to correct the misstatements of fact. The misstatements of law will be addressed in the reasons why the petition should be denied.

Respondent, Hoesterey, was the Assistant City Manager of petitioner, City of Cathedral City. (Opp. App. 1a, ¶12). According to City's Personnel Rules, which were adopted as a City Ordinance, Hoesterey was a nonprobationary employee. (Opp. App. 1a, ¶11). Because he had a vested property interest in his employment, Hoesterey could not be terminated without cause. (Opp. App. 1a ¶10, and Complaint Ex. A, Personnel Rules, p. 2, ¶III[1] and p. 3, ¶VI[6] Pet. App.). According to the due process safeguards found in the Constitution, if the City wanted to terminate him, it would have been required to provide Hoesterey with reasons for the termination and an opportunity to be heard.

For his own personal reasons, the City Manager of Cathedral City, petitioner Smith, wanted to discharge Hoesterey as early as 1985. However, since there was a lack of cause to justify a termination, the City Manager began employing manipulative tactics in an effort to induce and coerce Hoesterey to voluntarily submit his resignation. In January, 1985, the City Manager told Hoesterey that he no longer needed an Assistant City Manager. Moreover, the City Manager misrepresented the truth by telling Hoesterey that the position of Assistant City Manager was going to be abolished. To further induce a resignation, the City Manager told Hoesterey that it was time to "spread your wings and fly for the good of your career." (Pet. App. F1, ¶15).

Petitioners misrepresented the facts to this Court in the second paragraph of page 11 of their petition wherein they state that "Paragraph 15 of the Complaint alleges that Hoesterey was told as early as January, 1985, that he would be discharged without any opportunity to respond to charges, since the only reason for the discharge was that it was time for him "to spread [his] wings and fly for the good of [his] career." To the contrary, Paragraph 15 contains the reference to a discharge without an opportunity to be heard. (Pet. App. F1, ¶15). Paragraph 16 of the complaint refers to the City Managers statements as a "Proposed

Termination." (Opp. App. 2a, ¶16).

One year later in January, 1986, the City Manager again started to pressure Hoesterey for a resignation and requested that it be submitted by June, 1986. Hoesterey failed to submit his resignation. Continuing his efforts to induce a voluntary resignation, the City Manager, in late October, 1986, told Hoesterey that he better have another job by December 1, 1986 because Hoesterey could not continue in his position beyond that date. (Pet. App. F1, ¶17).

Petitioners, in their statement of the case, state that Hoesterey's complaint alleges that the October, 1986, oral statement by the City Manager to Hoesterey was a summary termination and constituted notice that the employment would terminate effective November 30, 1986 (Petition, p. 3-4). To the contrary, no such allegation of a summary termination can be found in Hoesterey's complaint.

Petitioners have taken a single paragraph out of context to form a pretext. The oral statement by the City Manager to Hoesterey in October, 1986 was clearly intended to mean that since Hoesterey could not be terminated without cause, and since Hoesterey failed to submit his resignation after the exertion of the earlier pressures brought about by the City Manager, the City Manager was increasing the pressure by stating that unless Hoesterey in fact resigned by December 1, 1986, he would be unlawfully terminated. (Pet. App. F1, ¶¶15 & 17).

It is important to emphasize the City Manager had no legal authority to discharge Hoesterey without cause. Therefore, in a final effort to avoid an unlawful termination, the City Manager threatened that if the resignation was not forthcoming within the allotted time, Hoesterey would be wrongfully discharged regardless of the legal consequences. (Pet. App. F1, ¶¶15 & 17). Further,

the City Manager expressly or impliedly threatened that if Hoesterey did not voluntarily resign, the City Manager would ensure that Hoesterey did not receive a favorable employment recommendation. (Pet. App. F1, ¶17 & Opp. App. 2a, ¶21).

More importantly, the facts set forth in the complaint do not indicate nor imply, as the petition states on p. 4, that the oral statements by the City Manager in October, 1986 had any finality to the decision. The oral statements were essentially conditional upon whether Hoesterey refused to voluntarily submitt his resignation by December 1, 1991.

Because the October, 1986 threat appeared to be more serious than the previous ones by reason of the close proximity and definiteness of the decision date, Hoesterey prepared a draft of a Severence Agreement that he had hoped would prevent the City Manager from destroying his career by providing unfavorable employment recommendations to future employers. In or about November, 1986, Hoesterey attempted to obtain the City Manager's signature on the agreement. (Pet. App. F2, ¶19).

The Severance Agreement was excecuted on Friday, November 28, 1986, the day after Thanksgiving when all City offices were closed. (Pet. App. F7). Hoesterey refused to resign until the City Manager at least signed the Hoesterey prepared Severance Agreement. After making numerous changes, the City Manager executed the document which effectively terminated Hoesterey's employment as of November 30, 1986. (Pet. App. F2, ¶19 & F6, ¶1).

In or about April, 1987, approximately four months after the effective date of termination, Hoesterey discovered that his job in fact had not been eliminated as had been previously represented by the City Manager. The falsity of the City Manager's representations were discovered by Hoesterey when applications

for the positon were being solicited by the City Manager. (Opp. App. 2a, ¶22 & 3a, ¶23).

It is significant to note that the City functioned under an unconstitutional City ordinance. Enacted by the City Council, the Personnel Rules did not require the City to provide written notice to an employee prior to discharge. Nor did the City ordinance require City to provide a due process hearing for nonprobationary employees. Instead the ordinance merely provided that a discharged employee could obtain a hearing by appealing the City Manager's written order of dismissal. But the City Manager was not required to provide the written notice. (Opp. App. 3a, ¶24).

Nonetheless, Hoesterey filed an appeal for a hearing with the City Council on October 10, 1987 after unsuccessfully attempting to win back his job by submitting an application when applications were solicited. The City Council refused to grant Hoesterey's request for a hearing and notified Hoesterey of its decision on October 28, 1987. (Opp. App. 3a, ¶26).

If Hoesterey's cause of action accrued on or after November 28, 1986, the complaint was timely filed on November 30, 1987. This is so because November 28, 1987 fell on a Saturday thus rendering timely the filing on the following Monday, November 30, 1987. (Judicial Notice).

The petitioners' statement of the case properly describes the procedural route in the lower courts up to the present time except for the needed clarification which follows in the next few paragraphs.

The question raised by Hoesterey before the Ninth Circuit was whether the period of limitations for denial of a due process hearing in the employment context commenced on (a) the date

of the initial notice of taking, (b) the last day of employment, or (c) the taking became final.

Upon appeal from the district court, the Ninth Circuit reversed the lower courts decision to dismiss the complaint. The appellate court, citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) based its review on the contents of the complaint, the allegations of which they accepted as true and construed in the light most favorable to Hoesterey. (Pet. App. A6).

Construing the allegations in the complaint in the light most favorable to Hoesterey, the Ninth Circuit panel held that there was insufficient indication that the "termination decision" in October, 1986, was final and would be accompanied by no further process. The court stated, "Nothing in the complaint suggests that Hoesterey was informed or should otherwise have known that he would receive neither such notification nor a pretermination hearing. Only when Hoesterey's employment was actually terminated, on his last day of work, did he know that he would receive no written notice or pretermination hearing." (Pet. App. A9).

Accordingly, the Ninth Circuit reversed the district court on the basis of the underlying facts.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE LOWER COURT FOLLOWED SUPREME COURT PRECEDENT BUT THE RESULT DIFFERED BY REASON OF THE UNDERLYING FACTS. THUS, THE QUESTION PRESENTED FOR REVIEW IS PRIMARILY FACTUAL AND PRESENTS NEITHER A SPECIAL NOR IMPORTANT ISSUE FOR REVIEW.

The decision of the lower court is entirely consistent with the Supreme Court cases cited by petitioners. Petitioners argue that the decision of the court below which held that the limitations period commenced on the last day of employment, is as a matter of law contrary to the decisions rendered by this Court in *Delaware State College v. Ricks,* 449 U.S. 250 (1981), and *Chardon v. Fernandez,* 454 U.S. 454 (1981). We disagree and contend that the lower court decision is entirely consistent with these cases. Although a contrary result was reached, it was only because of a difference in the underlying facts.

At the outset, it should be noted that there is a significant difference between the case at bar and *Ricks* in that the latter did not involve a permanent employee entitled to due process. Ricks was a *nontenured* college professor who had no right to continue in his job. Prior to the end of his employment contract, Ricks was notified that he was being denied tenure. On the date that Ricks was formally notified that tenure would be denied, he was offered a "terminal contract" which allowed him to continue to teach for an additional year in a nontenured capacity. Ricks, a black Liberian, challenged his denial of tenure by the college as a discriminatory act in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 2000, *et seq.*

The issue before the *Ricks* Court was whether the period of limitations commenced when Ricks was formally notified of the denial of tenure or at the end of his terminal contract. Ricks alleged that he was discriminated against when tenure was denied. *No further unlawful acts were alleged to have ocurred subsequent to the communication of the formal decision to deny tenure.*

In order to resolve the issue, the *Ricks* Court first sought to identify the unlawful employment practice. The only unlawful employment practice complained of was the denial of tenure. Thus, it was the denial of tenure that constituted the alleged discrimination. The Court, therefore, held that the period of limitations for an action based on discrimination for denial of tenure accrued when the decision became final and was communicated to Ricks.

Ricks is entirely consistent with the case at bar. The University made a formal decision to deny tenure and this decision was final and unequivocal. Consequently, the cause of action had its inception the moment that final decision was communicated to Ricks. Therefore, the Court was correct in holding that the end of the terminal contract had no legal significance with respect to the commencement of the statute of limitations unless there was a continuing violation. In the instant case, there was a constructive discharge and the termination did not become final until the last day of employement.

Chardon v. Fernandez, supra, involved a case similar to *Ricks.* Like Ricks, Fernandez was also a nontenured employee who claimed he was discriminated against by the denial of tenure. The issue was whether the limitations period should commence when the denial of tenure was communicated to Fernandez or on the last day of employment. Although Fernandez argued that he was discriminated against, he attempted to distinguish his case from *Ricks* by alleging that the unlawful employment practice was the

termination of employment rather than the earlier date when he was formally notified that tenure was denied.

The Fernandez Court looked beyond the allegations and found the case indistinguishable from *Ricks*. Dissecting the facts, the Court isolated the denial of tenure as the unlawful employment practice. In other words, the alleged discrimination took place, if at all, the moment Fernandez was notified of the denial of tenure. The subsequent termination of employment had no legal significance in terms of the underlying cause of action as the cause of action had already matured. Consequently, the Court held that the statute of limitations began when the formal decision was final and communicated to Fernandez rather than the last day of employment. 454 U.S. at 8.

In the case at bar, the lower court held that there was neither a formal nor final decision to terminate prior to November 28, 1986. Nor can it be said that the oral statements made by the City Manager to Hoesterey in October, 1986, either expressly or impliedly constituted a *final and unequivocal decision* to terminate. Nor do the facts indicate or even suggest that as of October, 1986, Hoesterey would be deprived of a due process hearing if he were terminated.

This case involves a constructive discharge. Thus, an oral statement at the whim of the City Manager which was part of a series of theretofore unsuccessful attempts to induce a resignation can hardly be classified as a formal and final decision. A reasonable person would think that a statement to be considered formal and final should at least be in writing. Moreover, for the statute of limitations on the denial of the due process hearing to commence on or about October, 1986, the written notice should contain an unequivocal statement that Hoesterey would not have an opportunity to be heard on his discharge.

None of these factors are present in this case. Instead, the October, 1986 statement made by the City Manager to Hoesterey was in substance conditional. The City Manager knew that he lacked the legal authority to discharge Hoesterey without cause. Therefore, the October, 1986 statement was nothing more than another attempt to elicit a resignation from Hoesterey. The statement could only have been reasonably interpreted to mean that either Hoesterey voluntarily resign by the designated date or the City Manager would unlawfully discharge him. We do not acutally know what the City Manager would have done had Hoesterey decided not to resign.

The point is that there was neither formality nor finality to the City Manager's oral statement. Nor was there any unequivocal statement that Hoesterey would nòt receive an opportunity to be heard if he did not resign. The understanding of a reasonable person in such a case would be that unless and until there was a discharge, there would be no right to a hearing.

In fact the actual discharge did not take place until at least November 28, 1986 when the City Manager successfully coerced Hoesterey to resign. It was on that date that the Severance Agreement was negotiated and executed. This was when the decision to terminate actually became final. Therefore, based on the facts of the case at bar, the decision of the Ninth Circuit was correct in holding that there was no final termination in October, 1986.

This Court has held that "a complaint cannot be dismissed for failure to state a claim *unless it appears beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, *supra*, at 45-46. In the instant case, it cannot be said that Hoesterey can prove no set of facts beyond any doubt to support his claim. The opposite seems to be quite apparent. Moreover in a statute of

limitations question, unless the action is clearly barred by the allegations set forth in the complaint, it is improper for the court to decide the issue as it is a function reserved for the jury.

Cases where a party disagrees with the application of the facts to the law are neither special nor important enough to warrant a review by this Court. This Court should not grant the petition for writ of certiorari.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

Nor does the decision below conflict with any of the appellate decisions cited by petitioners. For example, in *Holden v. Commission Against Discrimination*, 671 F.2d 30 (1st Cir. 1982), *cert. denied*, 459 U.S. 843 (1982), the plaintiff received notice on May 3, 1973 that she would be discharged from her job effective on August 31, 1973. Holden filed a complaint with the Equal Employment Opportunity Commission and subsequently received a right to sue letter.

The question decided by the First Circuit was whether the six month statute of limitations commenced on (a) the date Holden was notified of the discharge; (b) the date Holden received her right to sue letter from the EEOC; or (c) the date on which the state agency employing her declined jurisdiction of Holden's complaint (*Holden, supra,* 34).

Relying on *Ricks, supra*, and *Chardon, supra*, the *Holden* court held that the date of the wrong is the date of the advance notice in section 1983 cases. Thus, the court held that the statute of limitations began on May 3, 1973, the date Holden was notified of the discharge.

There is no inconsistency in *Holden* and the case at bar. In *Holden* the notification of discharge was deemed final. Therefore, the limitations period began on the date of notification. In the instant case, the facts do not even remotely suggest that the October, 1986 notice was final and unequivocal. In a constructive discharge case, it is difficult to hold that the employee knows or has reason to know that the decision is final until the actual date when employment terminates. Thus, the cases can be distinguished on the facts.

In *Kessler v. Board of Regents*, 738 F.2d 751 (6th Cir. 1984), by contrast, the court confronted the time of accrual of a due process claim but the decision of the Sixth Circuit squarely supports the Ninth Circuit's decision, rather than conflicting with it. Thus, Kessler received notice of termination from her employer, the University of Tennessee, on August 29, 1980. On June 30, 1981, the Board of Regents notified her that it found no basis to reverse the decision of the Chancellor.

Numerous violations were alleged by Kessler in her suit that was filed on August 30, 1982. In applying the one year statute of limitations, the court held that all of the violations complained of occurred more than one year prior to the filing of the complaint.

Kessler also contended that she was deprived of a due process hearing after she was terminated. Kessler claimed that since she had a constitutionally protected right to her job and did not receive a pretermination hearing, she was entitled to a posttermination hearing. The court agreed that she was entitled to a posttermination hearing but held that the deprivation of her due process rights had occurred, not when the decision to terminate became final, but on a subsequent date (June 30, 1981) when the Board of Regents notified Kessler of its decision to uphold the Chancellor's final determination. Thus, the one year limitation period began on the subsequent date. Since more than one year had elapsed

between June 30, 1981 and August 30, 1982, the date her suit was filed, the court held that the cause of action for denial of a due process hearing was time barred.

Kessler is similar to the case at bar in that both parties alleged a violation of due process in that the employer failed to provide a hearing.

What commenced the cause of action in *Kessler* was the notification by the Board of Regents to Kessler that it was upholding the Chancellor's determination. In the case at bar, petitioners argue that Hoesterey received final notice of termination in October, 1986, and that Hoesterey should have known that petitioners were not going to provide him with a pretermination hearing. Alternatively, according to *Kessler*, Hoesterey's cause of action for denial of a posttermination hearing should not accrue until City denied his appeal for a hearing which was about ten months after the last day of employment. In either event, Hoesterey's complaint was timely filed.

Accepting petitioners' contention as correct for argument's sake, Hoesterey would have still been entitled to a posttermination hearing within a reasonable time after the taking. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546-548; and *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Kessler v. Board of Regents, supra*; and *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981), *upon rehearing of* 621 F.2d 114; 738 F.2d 751, 755 (1984).

Assuming the termination was final and unequivocal in late October, 1986, as opposed to the last day of employment, Hoesterey's cause of action for denial of a due process hearing could only be time barred if forty-six days after notice of termination is deemed an unreasonable time to provide Hoesterey with a posttermination hearing. (Hoesterey's complaint was filed one year and no more than fifteen days after the late October, 1986 oral notification.)

The only conflict cited by petitioners is the district court case of *Garland v. Shapiro,* 579 F. Supp. 858 (E.D. Mich. 1984); however, that is scarcely the sort of disagreement among the lower courts that warrants review by this Court at this time.

A conflict among the circuits does not exist and this Court should not grant the petition for certiorari.

CONCLUSION

The decision rendered in this case by the Ninth Circuit is totally in accord with the legal precedent established by this Court. Nor is there a conflict among the circuits on this issue as petitioners would like to believe. The plain fact is that the decision below is totally logical and consistent with all appellate cases that have addressed the issue. Should a true conflict develop at some time in the future, this Court may see fit to clarify the positions. At the present time, there does not appear to be such a need.

Accordingly, this case lacks the significance and importance to justify review by this Honorable Court.

Respectfully submitted,

RUSSELL L. DAVIS
Attorney for Respondent

APPENDIX A — EXCERPTS FROM COMPLAINT *HOESTEREY V. THE CITY OF CATHEDRAL CITY, ET AL.* FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF RIVERSIDE CASE NO. INDIO 52029, FILED NOVEMBER 30, 1987

Paragraph 10 — First Cause of Action

10. Under Article VII, Section 6 of the Personnel Rules of Defendant City of Cathedral City, the City Manager could only dismiss a "regular employee" of the City for just cause. (A true and correct copy of the Personnel Rules are attached hereto as Exhibit A, except the period required to become a Regular Employee was amended since plaintiff began employment to provide for a twelve (12) month probationary period as opposed to six (6) months.)

Paragraph 11 — First Cause of Action

11. Six (6) months after July 12, 1982, plaintiff completed his probationary period whereupon plaintiff became a Regular Employee and acquired a property right in the continuation of his employment.

Paragraph 12. — First Cause of Action

12. During the course of plaintiff's employment, plaintiff was an excellent worker with an outstanding record of dedication, loyal and efficient service and contribution to the goals of defendant City of Cathedral City as well as to plaintiff's immediate supervisor, defendant Smith. In or about July, 1983, approximately one year after plaintiff's starting date, defendant City of Cathedral City promoted plaintiff to the position of Assistant to the City Manager. In or about July, 1984, approximately one year after the first promotion, plaintiff was

Appendix A

again promoted to the position of Assistant City Manager.

Paragraph 16 — First Cause of Action

16. After being informed by defendant Smith of the proposed termination, plaintiff, though reluctant to leave, began looking for a position as Assistant City Manager or City Manager in various other towns.

Paragraph 21 — First Cause of Action

21. The discharge of the plaintiff from his position as Assistant City Manager was accompanied by an express or implied threat that defendant Smith would give plaintiff a favorable employment recommendation and cause plaintiff's personnel record to indicate resignation only if plaintiff did not protest the termination. Defendant Smith's actions and conduct constituted coercion, undue influence and duress thereby causing plaintiff to reluctantly accept the termination and seek a comparable position in public administration in another city.

Paragraph 22 — First Cause of Action

22. In or about April, 1987, defendants began soliciting applications for the position of Assistance City Manager. By letter dated May 11, 1987, plaintiff submitted his application for the position of Assistant City Manager. On May 14, 1987, the Secretary to defendant Smith, acknowledged plaintiff's interest in the position, informed plaintiff that the list was being narrowed to fourteen (14) finalists and advised plaintiff that "it is unlikely you will be invited as one of the finalist (sic);"

Appendix A

Paragraph 23 — First Cause of Action

23. In or about August, 1987, plaintiff discovered that defendant City of Cathedral City hired an Assistant City Manager as of July 27, 1987.

Paragraph 24 — First Cause of Action

24. Article VIII, Sections 1 & 2 of defendant City of Cathedral City's Personnel Rules (Exhibit A) allow a dismissed employee to file an appeal to the City Counsel within ten (10) days of receipt of a written order of dismissal from the City Manager.

Paragraph 26 — First Cause of Action

26. On October 10, 1987, plaintiff timely filed an appeal of his dismissal to the City Council. Even though the ten (10) day period for filing a notice never began to run because plaintiff never received a written order of dismissal from the defendant City of Cathedral City, the City Clerk of the defendant City of Cathedral City, on October 28, rejected plaintiff's appeal and refused to bring the matter before the City Council.

Paragraph 35 — Second Cause of Action

35. The provision for a post-termination hearing for dismissed employees as set forth in the Personnel Rules did not meet the minimum safeguards to satisfy the requirements of procedural due process as the plaintiff's termination was not preceded by (a) written notice of defendant's proposed action; (b) the reasons therefor, (c) a copy of the charges and materials upon which the defendant's actions were based; and (d) the right to respond either orally or in writing.